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The Calvo and Drago Doctrines

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THE CALVO AND DRAGO DOCTRINES

Among the subjects scheduled for discussion at the third Pan-American conference, which met at Rio de Janeiro during July and August, 1906, was a resolution that the second peace conference at the Hague be requested to

consider whether and, if at all, to what extent, the use of force for the collection of public debts is admissible.

There seems to have been some objection to the resolution in this form on the ground that such action

would arouse the distrust of European capitalists and thus affect unfavorably the credit of Central and South American countries.¹

But a resolution was finally agreed upon on August 22, and unanimously adopted, which provided that the conference recommend to the governments represented that they

consider the advisability of inviting the second peace conference at the Hague to examine the question of the compulsory collection of public debts, and, in general, the best means tending to diminish among nations conflicts of purely pecuniary origin.²

It will be seen that the resolution in its final form, while in nowise binding upon the governments represented at the conference, recommends a consideration not only of the narrower Drago Doctrine, which merely forbids the forcible collection of public debts, but that it points to the broader Calvo Doctrine³ which absolutely condemns diplomatic as well as armed intervention⁴ as legitimate methods of

¹ L. S. Rowe in the *Independent* for October 5, 1906. Dr. Rowe adds: "This feeling was strengthened by the fact that, prior to the meeting of the conference, the European press had exploited to the utmost the dangers incident to the enunciation of any such doctrine."

² From President Roosevelt's recent message to Congress of December 4, 1906.

³ Of course there is no express or implied endorsement of the Calvo Doctrine contained in the above resolution. But in view of political and economic conditions and the teachings of publicists coupled with those of experience, there can be little question as to the state of public opinion on this subject in Latin America.

⁴ Calvo does not distinguish between armed and diplomatic or pacific intervention except as a matter of form. He condemns the latter as well as the former. See *Le Droit International* (5th ed.), i, §110, p. 267.

enforcing any or all private claims of a purely pecuniary nature, at least such as are based upon contract or are the result of civil war, insurrection or mob violence.

In his discussion of the important and complicated subject of intervention in the first volume of *Le Droit International*,⁵ Calvo claims that European nations have followed a different rule or principle of intervention in their dealings with American states from that which has governed their relations with each other. He points out that during the greater part of the nineteenth century at least, intervention in Europe always rested upon some important principle of internal politics, such as the balance of power, or upon some great moral or religious interest favorable to the development of civilization; while in the new world the interventions of European states have rested upon no legitimate principles, being based upon mere force and a failure to recognize the complete freedom and independence of American states. This, he explains, is due to the traditions of the colonial system.

Aside from political motives these interventions have nearly always had as apparent pretexts, injuries to private interests, claims and demands for pecuniary indemnities in behalf of subjects or even foreigners, the protection of whom was for the most part in nowise justified in strict law. * * * According to strict international right, the recovery of debts and the pursuit of private claims does not justify *de plano* the armed intervention of governments, and, since European states invariably follow this rule in their reciprocal relations, there is no reason why they should not also impose it upon themselves in their relations with nations in the new world.⁶

In that portion of his work, entitled *Mutual Duties of States*,⁷ Calvo denies categorically that a government is responsible for any losses or injuries sustained by foreigners in time of internal troubles or civil war.

To admit in such cases the responsibility of governments, *i. e.*, the principle of indemnity, would be to create an exorbitant and fatal privilege essentially favorable to powerful states and injurious to weaker nations, and to establish an unjustifiable inequality between nationals and foreigners.

⁵ *T. i, liv, iii.* See especially §§185-206.

⁶ *Op. cit.*, §205, pp. 350-351.

⁷ *T. iii, liv, xv.*

In sanctioning such a doctrine one would, he says, be guilty of a deep, although indirect, attack upon one of the fundamental elements of the independence of nations, viz: that of territorial jurisdiction. He adds:

Herein lies, in effect, the real significance of this frequent recourse [on the part of European governments] to the diplomatic channel for settling disputes which by their nature and surrounding circumstances belong to the exclusive domain of the ordinary courts.⁸

After citing a number of opinions of statesmen and examples drawn from the general practice of nations,⁹ Calvo restates his doctrine and presents the following conclusions:

1 The principle of indemnity and diplomatic intervention in behalf of foreigners for injuries suffered in cases of civil war has not been admitted by any nation of Europe and America.

2 The governments of powerful nations which exercise or impose this pretended right against states, relatively weak, commit an abuse of power and force which nothing can justify and which is as contrary to their own legislation as to international practice and political expediency.¹⁰

In his discussion of the Aigues Mortes affair in the sixth volume of his work,¹¹ Calvo also denies that a government, "in the absence of all fault on its part," is legally liable for injuries to foreigners which result from mob violence on the grounds that a state is not responsible for acts of mere individuals and that aliens can not claim a more extended protection than is granted to its nationals.

On December 29, 1902, Señor Luis M. Drago, minister of foreign affairs for the Argentine Republic, sent a note to Señor Mérou, the Argentine minister at Washington, which attracted widespread attention in Europe as well as in the United States. In this note, which

⁸ *Op. cit.*, §1280, p. 142. A few pages above (§1278, p. 140), Calvo speaks of the frequent attempts to impose upon American states the rule that "foreigners merit more consideration, and regards and privileges more marked and extended, than those accorded even to the nationals of the country where they reside." Elsewhere (t. vi, §256, p. 231), he observes: "It is certain that foreigners who establish themselves in a country have the same protection as nationals, but they can not lay claim to a protection more extended. If they suffer any wrong they ought to expect the government of the country to pursue the delinquents, but they should not claim from the state to which the authors of the violence belong any indemnity whatever."

⁹ *Ibid.*, §§1281-1296.

¹⁰ *Ibid.*, §1297, pp. 155-156.

¹¹ *T. vi, liv, xv, §256; cf. t. iii, §1271.*

was called forth by the attempt then being made by the allied powers (Great Britain, Germany and Italy) to collect certain claims against Venezuela by forcible means, Señor Drago stated at the outset that he would leave out of account those claims arising from damages suffered by subjects of the claimant nations during revolutions and wars but would confine himself to

some considerations with reference to the forcible collection of the public debt suggested by the events that have taken place.

In respect to loans to a foreign state, he argued that the lending capitalist always takes into account the resources of the country, the kind or degree of credit and security offered, and makes his terms more or less onerous accordingly. He knows that he is dealing with a sovereignty, and

it is an inherent qualification of all sovereignty that no proceedings for the execution of a judgment may be instituted or carried out against it.

This argument he based upon the theory of the freedom and independence of states which lies at the basis of the modern system of international law.

In support of this contention, Señor Drago quotes Alexander Hamilton, who said:

Contracts between a nation and private individuals are obligatory according to the conscience of the sovereign and may not be the object of compelling force. They confer no right of action contrary to the sovereign will.

He also cites the eleventh amendment to the Constitution of the United States, which provides that

the judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state.

Señor Drago admitted that the payment of its public debt (the amount of which may be determined by tribunals of the country or by arbitration) is absolutely binding on the nation; but he maintained that it (the nation) has a

right to choose the manner and the time of payment, in which it has as much interest as the creditor himself, or more, since its credit and its national honor are involved therein.

He explains that

this is in nowise a defense for bad faith, disorder, and deliberate and voluntary insolvency. It is merely intended to preserve the dignity of the public international entity which may not thus be dragged into war with detriment to those high ends which determine the existence and liberty of nations.

Declaring that the Argentine people were alarmed lest the action of the allied powers in Venezuela "would establish a precedent dangerous to the security and peace of the nations of this part of America" (for "the collection of loans by military means implies territorial occupation to make them effective, and territorial occupation signifies the suppression or subordination of the governments of the countries on which it is imposed," a "situation" which "seems obviously at variance with the Monroe Doctrine"), and pointing to the danger lest European nations make use of "financial intervention" as a pretext for conquest, this far-sighted Argentine statesman suggests that the United States adopt or recognize the principle

that the public debt [of an American state] can not occasion armed intervention, nor even the actual occupation of the territory of American nations by a European power.¹²

In his message of December 5, 1905, President Roosevelt pronounced himself with his wonted vigor in favor of the Drago Doctrine. After calling the attention of Congress to the embarrassment that might be caused to our government by the assertion by foreign nations of the

¹² For the text of the Drago Note, See House Doc. of 58th Congress, 2d session (1903-04), pp. 1-5.

In a memorandum sent to Señor Mérou in reply to this communication, Secretary Hay discreetly expressed neither assent to nor dissent from the propositions set forth by Señor Drago, but he quoted two passages from recent messages by President Roosevelt to indicate the general position of the government of the United States: "The President declared in his message to Congress of December 3, 1901, that by the Monroe Doctrine we do not guarantee any state against punishment if it misconducts itself, provided that punishment does not take the form of the acquisition of territory by any non-American state;" and "in harmony with the foregoing language, the President announced in his message of December 2, 1902: 'No independent nation in America need have the slightest fear of aggression from the United States. It behooves each one to maintain order within its own borders and to discharge its just obligations to foreigners. When this is done they can rest assured that, be they strong or weak, they have nothing to dread from outside interference.' " Secretary Hay closed this communication with a declaration in favor of arbitration in such cases.

right to collect by force of arms contract debts due by American republics to citizens of the collecting nation, and to the danger that the process of compulsory collection might result in the permanent occupation of territory, he said:

Our own government has always refused to enforce such contractual obligations on behalf of its citizen by an appeal to arms. It is much to be wished that all foreign governments would take the same view.

A comparison between the views of Calvo and Drago as above expressed will show that they differ in two very important respects. The Drago Doctrine is much narrower in scope than that of Calvo. Señor Drago merely denounces armed intervention as a legitimate or lawful means of collecting public debts, whereas Calvo denies the right to employ force in the pursuit of all private claims of a pecuniary nature. Indeed, Calvo advances a step beyond this position. He absolutely denies that a government is responsible by way of indemnity for any losses or injuries sustained by foreigners in time of internal troubles, civil war, or for injuries resulting from mob violence (provided the government is not at fault) on the grounds that the admission of such a principle of responsibility would "establish an unjustifiable inequality between nationals and foreigners" and would undermine the independence of weaker states. He does not even admit that the ordinary channels of diplomacy are open to claimants in such cases.

In general, private claims of a pecuniary nature against Latin American states may be classified as follows: 1, Claims arising from acts of violence or oppression, such as cruel treatment, false imprisonment, expulsion or mob violence; 2, those based on losses sustained during civil war or insurrection; 3, those based upon contract, consisting for the most part of claims of bondholders and investors whose investments have been guaranteed by the defaulting government.¹³

¹³ So, *e.g.*, the claims of Great Britain and Germany against Venezuela in 1902-03 were divided into three categories: 1, Those based upon the false imprisonment and bad treatment of British subjects and the seizure of British vessels; 2, losses of British and German subjects sustained during recent civil wars and revolutions; and 3, the claims of creditors, including not only ordinary bondholders but also a number of Britons and Germans whose investments had been guaranteed by the Venezuelan government. Also see an article by the writer, entitled *The Venezuelan Affair in the Light of International Law* in the *American Law Register* (May, 1903), vol. 42, n. s., pp. 250 ff.

The liability of a government for acts of violence and oppression must depend upon the circumstances of each case. A state is of course *directly* responsible¹⁴ for acts of its agents and must bear the full consequences of any violation of the laws of nations committed by these. Such acts should be promptly disavowed and, if of sufficient importance, their authors punished and reparation made.¹⁵

In ordinary times a state is also *indirectly* responsible for the orderly conduct of all those residing or domiciled within its territory and subject to its jurisdiction, and is bound, not indeed to prevent all acts of violence against foreigners, but to furnish the same degree and kind of protection and, generally speaking, provide the same means of redress or measure of justice that is granted to its own nationals.¹⁶

In attempting to secure redress or justice, foreigners must in the first instance have recourse to the local or territorial tribunals of the district in which they are domiciled, or, as Vattel¹⁷ puts it, to the "judge of the place." Judicial remedies should, as a rule, be exhausted before resorting to diplomatic interposition for means of obtaining redress.¹⁸ But this rule does not apply in case of a gross or palpable denial of justice, where local remedies are wanting or insufficient, where judicial action is waived, where the act complained of is in itself in violation of international law, or where there is undue discrimination against foreigners on the part of the authorities.¹⁹

¹⁴ This responsibility is to states rather than to individuals. The individual, as such, has neither rights nor duties in international law other than those belonging to him as a citizen or subject to an international entity. On the theory of International Responsibility of States for Injuries Suffered by Foreigners, see two recent articles by M. Anzilotti in the *Revue Générale de Droit International Public* for 1906, pp. 5-29 and 285-309.

¹⁵ This does not apply to the judicial functionaries who are more or less independent of the executive in all modern well-regulated states. "All therefore that can be expected of a government in the case of wrongs inflicted by the courts is that compensation shall be made, and if the wrong has been caused by an imperfection in the law of such kind as to prevent a foreigner from getting equal justice with a native of the country, that a recurrence of the wrong shall be presented by legislation." (Hall, *Treatise* (3d ed.) §65, p. 214.)

¹⁶ This is the general rule, but it is not, as we shall see, wholly without exception.

¹⁷ Bk. II, ch. 8., §103; cf. Bk. II, ch. 6, §§ 72 and 73.

¹⁸ Moore, *Digest of International Law*, vi, §987. Wharton, ii, §241.

¹⁹ For examples of such exceptions, see Moore, §§913-914, 986-993, 1021, and Wharton, §§230 and 242.

It

does not apply to countries of imperfect civilization, or to cases in which prior proceedings show gross perversion of justice.²⁰

The question of the liability of a state for injuries to the persons or property of foreigners resulting from mob violence is one in which the people and government of the United States as well as those of Latin America, should be deeply interested. Whether due to the intensity of feeling engendered by race and labor problems or to a lax enforcement of the law resulting from cumbrous and antiquated legal methods, the American custom of lynching for certain crimes and under certain conditions shows little sign of abatement and is not likely to disappear until the causes which lead to it are removed.

The rule which has generally been verbally maintained by American statesmen seems first to have been laid down by Daniel Webster in connection with the riots at New Orleans, and Key West in 1851, which resulted from the summary execution of a number of American filibusters in Cuba. While admitting that the Spanish consul (whose office had been attacked and furniture destroyed)²¹ was entitled to indemnity, Mr. Webster maintained that those Spanish subjects who had been injured in person or property (there seems to have been no one killed) were not entitled to compensation, inasmuch as "many American citizens suffered equal losses from the same cause," and foreigners are merely

entitled to such protection as is afforded to our own citizens. * * * These private individuals, subjects of Her Catholic Majesty, coming voluntarily to reside in the United States, have certainly no cause of complaint, if they are protected by the same law and the same administration of law, as native born citizens of this country.²²

As a mark of courtesy and out of respect to the magnanimity of the queen of Spain (in liberating American prisoners), Congress nevertheless granted compensation to Spanish subjects as well as to the Spanish consul for losses sustained during these riots.

History has repeated itself in the case of a number of claims made by foreigners for injuries resulting from mob violence in the United

²⁰ Mr. Evarts, Secretary of State, to Mr. Marsh. Wharton's Digest, iii, p. 695.

²¹ The archives of the consulate had also been thrown into the street, the portrait of the queen of Spain defaced, and the Spanish flag torn to pieces.

²² Wharton's Digest, ii. §226, p. 601; cf. Moore, vi, §1023, pp. 812-813.

States from that day to this. In the majority of these cases, the United States government has refused to admit liability in principle, but has granted compensation as a matter of grace and favor, or from a sense of magnanimity, sympathy, benevolence or policy.²³ Some of our statesmen, however, admit liability in case of a failure on the part of the local authorities or courts to use due, *i. e.*, reasonable, diligence in preventing or punishing such crimes, and this is unquestionably a rule of international law.²⁴

On the other hand, the United States has shown commendable zeal in protecting its citizens from such attacks abroad. It has repeatedly interposed diplomatically in China, Turkey, Mexico, Panama, Chili, Brazil and other Central and South American States.²⁵

In view of this double inconsistency—that of theory and practice on the one hand, and that of our attitude at home and abroad on the other—would it not be wise for our government frankly to admit liability in all cases of attack by mobs upon foreigners as such or upon those of a particular nationality wherever and whenever the local authorities show themselves unwilling or unable to prevent, and the courts unable or unwilling to punish such crimes? Foreigners cannot be expected to appreciate the merits (?) of our present “peculiar” national institution of lynching, and foreign states have an undoubted right to demand a better protection for their nationals against this species of violence than is afforded them by our own local authorities and courts in some parts of this country.

²³ This was notably so in the cases of the 43 Chinese killed and wounded at Rock Springs, Wyoming in 1885 and of the Italians lynched at New Orleans, in 1891. For these and numerous other cases, see Moore's Digest, vi, §1026.

²⁴ This rule is usually stated in language ascribed to Secretary Evarts: “A government is liable internationally for damages done to alien residents by a mob which by due diligence it could have repressed.” See Wharton's Digest, ii, p. 602. But the absence of quotation marks in Wharton and a reference to Evarts' dispatch in Moore's Digest (see vol. vi, pp. 817-818) shows that Mr. Evarts did not use the language ascribed to him. It is, however, a good statement of an undoubted principle of international law if we add the words “and which it fails to punish.” The fact that our Federal government has sometimes been unable to secure justice for foreigners by reason of constitutional or statutory limitations does not affect its international responsibility.

²⁵ Moore, *op. cit.* For the diplomatic activity of the United States in China, see the extremely able communication of the Chinese minister, Cheng Tsao Ju, to Secretary Bayard, on pp. 822-826.

But it may be urged that the admission of such a rule or principle might, in some cases, give to foreigners a protection superior to that enjoyed by its own citizens. This may be true in countries where life and property is insecure from mob violence, but civilized states are supposed to grant at least a fair or average amount of such protection in ordinary times, and it is no adequate reply to a charge of denial of justice²⁶ to, or an undue discrimination against, foreigners to say that nationals frequently suffer similar injustice. It would of course be different in the case of an ordinary miscarriage of justice, where the spirit as well as the forms of the law had been complied with, or in the case of one accidentally killed or injured in the course of a riot or insurrection.²⁷

In view of the recent protest by Japan against the segregation of Japanese school children in California and the surprising ignorance of the principles governing the rights and privileges of foreigners displayed in some quarters, it seems necessary to point out that a state is under no international obligation to extend to foreigners the enjoyment of civil and private rights or to place them upon an equal footing with its own nationals in these respects. Whatever rights or privileges of this kind foreigners may enjoy, whether of an educational, economic or religious nature, are based on convention or the principle of reciprocity, or are granted as a matter of pure grace and favor.²⁸ All that an alien, who is permitted to set foot or reside on foreign territory (and this permission is purely optional) can demand as a matter of strict right in international law is protection of life and property together with access to the local courts for that purpose.

The same principles may, in general, be said to apply to cases of injuries or losses sustained by foreigners during civil war and insurrection, except that the law of necessity or the physical inability to furnish adequate protection generally absolves governments from responsibility in such cases. The general rule is that

a sovereign is not ordinarily responsible to alien residents for injuries they receive on his territory from belligerent action, or from insurgents whom he could not control.

²⁶ On what constitutes a denial of justice, see especially, Moore vi, §986; Wharton, ii, §230; and Anzilotti, *op. cit.*, pp. 21-23.

²⁷ See, e.g., the case of Bain in Moore, *op. cit.*, §1027.

²⁸ See especially on this head, the recent article by Anzilotti in the R. D. I. P., cited above, pp. 18-20.

They are

not entitled to greater privileges or immunities than the other inhabitants of the insurrectionary district. * * * By voluntarily remaining in a country in a state of civil war they must be held to have been willing to accept the risks as well as the advantages of that domicile.²⁹

These principles have been repeatedly enunciated by our leading statesmen,³⁰ as well as by those of Europe,³¹ and they have the almost unanimous sanction of leading authorities on international law.³² They have invariably been applied by European states in their relations with each other, although frequently violated in their dealings with weaker states, more particularly in the cases of China, Turkey and the republics of Latin America.

There are, however, several exceptions which must be made to these general principles. Indemnity would seem to be due to foreigners by way of exception in the following cases: 1. Where the act complained of is directed against foreigners as such, or as subject to the jurisdiction of some particular state. 2. Where the injury results from an act contrary to the laws or treaties of the country in which the act was committed, and for which no redress can otherwise be obtained. 3. When there has been a serious violation of international law, more particularly of the rules of civilized warfare. 4. In cases of evident denial of a palpable violation of justice, or undue discrimination against foreigners on the part of the authorities.³³

²⁹ Wharton's Digest, iii, §223. Secretary Seward to Count Wydenbruck in 1865. See Moore's Digest, vi, pp. 885-886. *cf.* Wharton, pp. 577-578.

³⁰ For numerous opinions of American statesmen, see Moore's Digest, vi, §§1032-1049. *cf.* Wharton, iii, §§223-226.

³¹ See especially the notes of Prince Schwartzenburg (Austrian) and Count Nesselrode (Russian) in reply to certain claims of the British government which were based upon injuries to British subjects during the revolutions in Tuscany and Naples in 1848. Cited by Pradier-Fodéré, i, §205, pp. 343-345 and Moore, *op. cit.*, pp. 886-887.

³² See, *e. g.*, Calvo, iii, §§1280 ff.; Pradier-Fodéré, *Traité*, i, §§202 ff., 402 ff., iii, §§1363 ff.; Fiore, *Droit Int. Pub.* (Antoine's trans.), i, §675; Wharton, iii, §223; Hall, *Treatise* (3d ed.), §65, pp. 218-219; Bluntschli, §380 *bis*; Funck-Brentano et Sorel, *Précis*, ch. 12, pp. 227-229; Taylor, §216; Oppenheim, i, p. 213; Bonfils (Fauchille), §§326 ff.; Liszt, §24, pp. 189-190; Pillet, *Les Lois de la Guerre*, p. 29; Weisse, *Le Droit International appliqué aux Guerres Civiles*, §14; Bar in R. D. I. for 1899, t. xxix, pp. 464-482. See Brusa in *Annuaire* for 1898, t. xvii, pp. 96-138 for arguments in favor of responsibility.

³³ See especially the rules adopted by the Institute of International Law in 1900. *Annuaire*, xviii, pp. 254-256. *cf.* Moore's Digest, *op. cit.*, Pradier-Fodéré, iii, §1366, p. 237; Bar and Brusa, cited above.

In respect to the third class of claims, viz: those based upon contract, including for the most part those of bondholders and investors whose investments have been guaranteed by the defaulting government, the few authorities who discuss this question appear to be divided in their opinions, with a majority opposed to forcible collection. The right of a state to use coercive measures in the collection of debts of this nature is asserted, *e. g.*, by Hall, Phillimore, and Rivier; but it is denied by Calvo, Pradier-Fodéré, Rolin-Jaequemyns, F. de Martens, Despagnet, Kebedgy, and Nys.³⁴

It is argued, on the one hand, that the public faith, the so-called "honor of the prince," is particularly engaged in the case of contracts of this nature, inasmuch as a government cannot be sued without its own consent; that creditors may have no other means of redress than that of appealing to the government of the state to which they owe allegiance; that stock in the public debt held even by an enemy is exempt from seizure and its interest payable even in time of war; and that states, being in legal theory free and independent and having no common superior to control or check them in any way, each state has therefore the legal right of deciding for itself when its rights have been invaded and of determining the conditions under which it may use force for any purpose whatsoever.³⁵

On the other hand, it is urged that hazardous loans and investments should be discouraged as much as possible; that those making them

³⁴ Hall, §86, pp. 277-279; Phillimore, ii, pt. v, ch. 3, pp. 26-30; Rivier, i, *liv*, iv, ch. 2, §20, pp. 272-273; Calvo, i, §205, p. 350; Pradier-Fodéré, i, §405, pp. 620-623; Rolin-Jaequemyns in R. D. I., t. i (1869), pp. 145 ff.; F. de Martens in R. D. I., t. xix, p. 386 and in a recent pamphlet, entitled *Par la Justice vers la Paix*; Despagnet, Cours, §258; Kebedgy in R. D. I. P., t. i, p. 261, and Nys, ii, p. 225.

On April 17, 1903, the publicist Calvo, then representing the Argentine Republic at Paris, addressed a circular letter to a number of leading authorities on international law, asking for their views on the question raised by the Drago note. Of the ten opinions published in the *Revue de Droit International* (see R.D.I. for 1903, pp. 597-623), six (those of Passy, Moynier, Campos, Férand-Giraud, Weiss and Olivecrona) were in substantial agreement with the principals of the Drago note. Four (those of Westlake, Holland, Charmes and Fiore) were more reserved. While apparently not in absolute disagreement with the principles of the Drago note, they held either that it needed qualification or that the question was undecided. For a brief analysis of these opinions, see Percy Bardwell in the *Green Bag* for July, 1906, pp. 378-379.

³⁵ Such is, *e. g.*, the argument of G. W. Scott in the *North American Review* for October 5, 1906, pp. 603-604.

do so, as a rule, with a full knowledge of the risks incurred and in the hope of exceptionally large returns; that the natural penalty of a failure on the part of a state to fulfill its obligations is a loss of credit; that foreigners cannot expect to be preferred to native creditors; that coercive measures for the collection of bad debts are never employed except against weaker states and are likely to be used as a pretext for aggression or conquest; and that

it is an inherent qualification of all sovereignty that no proceedings for the execution of a judgment may be instituted or carried out against it.³⁶

The views of British and American statesmen are not in complete harmony on this important subject, although the general policy of Great Britain and the United States has been substantially the same.³⁷ The English view, as stated by Lord Palmerston, in 1848, in a circular addressed to representatives of Great Britain in foreign countries, insists that the question as to whether such claims are to be made a subject of diplomatic negotiation is

for the British government entirely a question of discretion, and by no means a question of international right.

With a view, however, of discouraging the investment of British capital in hazardous loans to foreign governments and of encouraging investment in profitable undertakings at home,

the British government has hitherto thought it the best policy to abstain from taking up as international questions the complaints made by British subjects against foreign governments which have failed to make good their engagements in regard to such pecuniary transactions.

But he intimates that such loss might become so great as to make a change of policy on the part of the British government advisable. These views of Lord Palmerston were reaffirmed by Lord Salisbury in January, 1882, and by Premier Balfour in December, 1902.³⁸

³⁶ Señor Drago in note, cited above.

³⁷ Except for the British intervention in Mexico, Egypt and Venezuela. But in all these cases those representing the government of Great Britain denied that they intervened primarily for the sake of the bondholders.

³⁸ For the text of this circular, see Hall, note on pp. 278-279 (3d ed.), and Phillimore ii, t. v, ch. 3, pp. 27-28. In 1861, Lord John Russell, in a communication to Sir C. I. Wyke, stated that "it has not been the custom of Her Majesty's government, although they have always held themselves free to do so, to interfere authoritatively on behalf of those who have chosen to lend their money to foreign governments."

The policy of the United States³⁹ in dealing with claims based on contracts was thus stated by Secretary Fish in 1871:

Our long-settled policy and practice has been to decline the formal intervention of the government except in cases of wrong and injury to person and property such as the common law denominates *torts* and regards as inflicted by force, and not the result of voluntary engagements or contracts.

In cases founded upon contract, the practice of this government is to confine itself to allowing its minister to exert his friendly good offices in commending the claim to the equitable consideration of the debtor without committing his own government to any ulterior proceedings.⁴⁰

In 1881, Secretary Blaine laid it down as "a rule of universal acceptance and practice" that a person

voluntarily entering into a contract with the government of a foreign country or with the subjects or citizens of such foreign powers, for any grievance he may have or losses he may suffer resulting from such contract, is remitted to the laws of the country with whose government or citizens the contract is entered into for redress.⁴¹

The representatives of the United States at the third Pan-American conference, which met at Rio de Janeiro during the months of July and August, 1906, were given the following instructions:

It has long been the established policy of the United States not to use its armed forces for the collection of ordinary contract debts due to its citizens by other governments. We have not considered the use of force for such a purpose consistent with that respect for the independent sovereignty of other members of the family of nations, which is the most important principle of international law and chief protection of weak nations against the oppression of the strong. It seems to us that the practice is injurious in its general effect upon the relations of nations and upon the welfare of weak and disordered states, whose development ought not be encouraged in the interests of civilization; that it offers frequent temptation to bullying and oppression and to unnecessary and unjustifiable warfare. We regret that other powers, whose opinions and

³⁹ For the opinions of American statesmen on this head, see Moore's and Wharton's Digest, §§916, 918, 995-998; and §§231-232, respectively.

⁴⁰ Moore's Digest, vi, §995, p. 710. *cf.* Wharton, ii, §231, p. 656.

⁴¹ Wharton's Digest, ii, pp. 658-659. But exceptions have been made in cases where diplomacy furnished the only means of redress, as in case of non-performance of a government contract, or arbitrary confiscation of vested rights, or of annulment of charters or concessions. For examples, see Moore's Digest, vi, §§918, 996 and 997 and Wharton, ii, §232. "International commissions have frequently allowed claims based on the infraction of rights derived from contracts where the denial of justice was properly established," Moore, p. 718.

sense of justice we esteem highly, have at times taken a different view and have permitted themselves, though we believe with reluctance, to collect such debts by force. It is doubtless true that the non-payment of public debts may be accompanied by such circumstances of fraud and wrongdoing or violation of treaties as to justify the use of force. This government would be glad to see an international consideration of the subject which shall discriminate between such cases and the simple non-performance of a contract with a private person, and a resolution in favor of reliance upon peaceful means in cases of the latter class.

It is not felt, however, that the conference at Rio should undertake to make such a discrimination or to resolve upon such a rule. Most of the American countries are still debtor nations, while the countries of Europe are the creditors. If the Rio conference, therefore, were to take such action it would have the appearance of a meeting of debtors resolving how their creditors should act, and this would not inspire respect. The true course is indicated by the terms of the program, which propose to request the second Hague conference, where both creditor and debtors will be assembled, to consider the subject.⁴²

It will thus be seen that whereas Great Britain has, generally speaking, refrained from diplomatic intervention in such cases purely from motives of policy or expediency, the United States appears to have been restrained, to a certain extent at least, by principle and by a regard for what it believed to be the law of nations.

When we turn to international practice, which is, generally speaking, the basis of international law, we find, it is true, a considerable number of instances not merely of pacific or diplomatic interposition, but of actual armed intervention on financial grounds, as *e. g.*, in Mexico, Egypt, Portugal, Nicaragua, Venezuela, and in Turkey. But a closer scrutiny and reflection will not fail to convince us that these cases are altogether exceptional and only serve to prove that the ordinary everyday rule is that of non-intervention.

It is obvious that the question of the forcible collection of all claims of a pecuniary nature (we are not speaking of diplomatic intervention or interposition) must be decided in accordance with the principles governing the intervention of one state in the internal affairs of another.

The subject of intervention is one of great difficulty and complexity. This arises from the fact that there exists nowhere else within the wide range of international relations such an apparent conflict between politi-

⁴² From President Roosevelt's recent message to Congress of December 4, 1906.

cal theory or fundamental principles on the one hand and actual international practice on the other. The whole modern or Grotian system of international law rests upon the doctrine of the absolute legal equality and complete independence of fully sovereign states. This presupposes full liberty of action on the part of each sovereign within his own sphere or jurisdiction and non-interference in the external or internal affairs of other sovereigns. The rule or doctrine of non-intervention is therefore a necessary corollary of the doctrine or principle of the complete equality and independence of sovereign states and is a fundamental principle of international law.

But international law is supposed to rest upon international practice as well as upon fundamental principles, and when we turn to examine the actual practice of sovereign states, and especially that of the great powers during the nineteenth century, we find numerous examples of armed intervention on all sorts of grounds and pretexts. Intervention on grounds of morality or humanity, *e. g.*, to put an end to great crimes and slaughter or to various forms of cruelty and oppression (as in the case of religious persecution), to prevent the extermination of a race or a needless diffusion of blood, to assure the triumph of right and justice, etc.; intervention on grounds of policy or interest, *e. g.*, to secure the balance of power or maintenance of political equilibrium in Europe, to enforce protection of the persons and property of citizens or subjects of the intervening state, to prevent the spread of political heresy or revolution, to advance the interests of civilization, etc.; interventions on so-called legal grounds, for the sake of self-preservation, to prevent or terminate the unjustifiable or illegal intervention of another state, to enforce treaties of guarantee or fundamental principles of international law: these are some of the grounds or pretexts which have been advocated as sufficient causes for armed intervention in particular cases.

Authorities on international law have always differed widely in their opinions as to what constitute legal or justifiable grounds for intervention or whether, indeed, there exists any such right at all. The only approach to unanimity is in respect to the right of self-preservation which is, properly speaking, not a law at all in the ordinary sense of that term as applied to positive rules and regulations, but is a fundamental right or principle which underlies and takes precedence of all

systems of positive law and custom, and from whose operation neither nations nor individuals could escape if they would.

The present tendency among publicists is certainly toward the acceptance of the principle of non-intervention as the correct and normal or every-day rule of international law and practice;⁴³ but to admit intervention as a legitimate exercise of sovereign power in extreme or exceptional cases on high moral or political rather than on purely legal grounds, as for instance in case of great crimes against humanity (Greece, Armenia, and Cuba) or where essential and permanent national or international interests of far-reaching importance are at stake (Ottoman Empire, Mexico, or Panama).

Like war,⁴⁴ intervention is not, strictly speaking, a right in the ordinary legal sense of that term, although, like war, it is a source of legal rights and duties. Like war it is an exercise of sovereign or high political power, a right inherent in sovereignty itself. "The government which intervenes performs a political act."⁴⁵ "It is a high and summary procedure which may sometimes snatch a remedy beyond the reach of law,"⁴⁶ but which is either "above and beyond the domain of law,"⁴⁷ and a justifiable exception to the ordinary, everyday rule of non-intervention, or an act based upon the mere consciousness of physical force. Inasmuch as a sovereign who chooses to exercise this

⁴³ Among modern authorities on international law, who either deny the right of intervention or accept the principle of non-intervention with or without exceptions, the following may be cited: Bonfils (Fauchille) §§295-324; Heffter (Geffcken), §§44-46; Woolsey, §43; Wilson and Tucker, §41; Walker, Science, pp. 112, 151; De Floecker, *De l'Intervention* (1896), ch. 2, §3; F. de Martens, *Traité*, i, §76, pp. 394 ff.; Liszt, §7, pp. 60 ff.; Despagnet, *Cours*, pp. 188 ff.; Funck-Brentano et Sorel, *Précis*, pp. 212-216; P. Fodéré, *Traité*, §355; Rivier, *Principes*, i, pp. 390 ff.; Nys, *Le Droit Int.* (1905), ii, pp. 182-193, especially p. 191; Merignac, *Traité* (1905), i, pp. 284 ff. Calvo is not among the champions of non-intervention. Several of the authorities above cited like P. Fodéré and Funck-Brentano et Sorel deny the legal character or validity of the principle of non-intervention as well as that of intervention. The view of the majority seems to be that the correct rule of international law is non-intervention, but that intervention is either legally or morally permissible in extreme and exceptional cases.

⁴⁴ It differs from war in that a mere threat to use force is sufficient to constitute an intervention. In case of resistance, it almost inevitably leads to war.

⁴⁵ Funck-Brentano et Sorel, *Précis*, pp. 212-216. For a brief exposition of this view, which is believed to be that of the most advanced publicists in Europe, see an article by Professor Georg Jellinek in 35 *Am. Law Review*, pp. 56-62.

⁴⁶ *Letters of Historicus* by Sir W. Harcourt, p. 41.

⁴⁷ Lawrance, *Principles*, pp. 121.

supreme assertion of political power cannot as a rule be restrained except by the counter use of force, it may become necessary for another or other interested sovereigns to exercise a similar political power and intervene against such unjust or injurious act of intervention.

We trust it is now sufficiently clear to all as to what our attitude as a nation is or should be toward the Calvo and Drago Doctrines. Both the wider Calvo and the narrower Drago Doctrines are essentially sound in principle and expedient as policy, although Calvo goes too far in condemning diplomatic interposition or the presentation of claims for indemnity in all cases under consideration, and he does not sufficiently allow for exceptions to general rules or principles which are otherwise sound and correctly stated by him. The range and character of these exceptions have been indicated in the first part of this article.

While we do not deny the responsibility of governments to foreigners and their liability in certain cases, even during times of civil war and insurrection, it is certain that the major part of such demands are usually far in excess of liability and are based on erroneous principles. The following examples, selected for the most part from Moore's *Work on Arbitration*, may serve to illustrate the exorbitant amounts of most of these claims.⁴⁸

The Civil War claims of Great Britain against the United States, which were settled by a mixed commission in 1873, amounted (with interest) to about \$96,000,000. Less than \$2,000,000 was actually awarded to the British claimants. Of the 478 British claims, 259 were for property alleged to have been taken by the military, naval or civil authorities of the United States; 181 for property alleged to have been destroyed by the military and naval forces of the United States; 7 for property destroyed by the Confederacy; 100 for damages for the alleged unlawful arrest and imprisonment of British subjects by the authorities of the United States; 77 for damages for the alleged unlawful capture and condemnation or detention of British vessels and their cargoes as prize of war by the naval forces and civil authorities of the United States.⁴⁹

⁴⁸ In a recent pamphlet, entitled *Par la Justice vers la Paix*, Professor F. de Martens calls special attention to the excessive and fraudulent character of many of these claims.

⁴⁹ See Moore on Arbitration, i, pp. 692-693.

The claims of France growing out of the Civil War were also settled by a mixed commission which met in 1880-84. They aggregated about \$35,000,000. The amount actually awarded was \$625,566.35, *i. e.*, less than 2 per cent of the amount demanded. Many of the claims are said to have been fraudulent and others were greatly exaggerated. Most of the awards were for injuries inflicted by the armies of the United States, *i. e.*, presumably for violations of the laws of warfare.⁵⁰

The claims of the citizens of the United States against Mexico, presented to the mixed commission which met in July, 1869, and continued in session until January, 1876, amounted to the enormous sum of \$470,000,000. The actual amount awarded was \$4,000,000 or less than one per cent. The claims of citizens of Mexico against the United States amounted to \$86,000,000. They received \$150,000.⁵¹

The mixed commissions which adjudicated the claims against Venezuela at Caracas during the summer of 1903, awarded 2,313,711 bolivars to claimants of the United States out of 81,410,952 which were demanded; 1,974,818 to Spanish claimants who had demanded 5,307,626; 2,975,906 to Italian claimants who had asked for 39,844,258; 2,091,908 to German claimants who had demanded 7,376,685; 9,401,267 to British claimants instead of 14,743,572 as demanded; and 10,898,643 to Belgian claimants who had only demanded 14,921,805 bolivars.⁵² The demands of French claimants, which amounted to nearly \$8,000,000 were cut down to \$685,000.⁵³

Besides being excessive in amount, it is believed that many of these claims are bottomed on fraud and tainted with illegality and injustice. It is notorious that the sums received by a government are often far below the face value of the loan and many of the claimants for losses during civil war or insurrection are not above a well-grounded suspicion of having themselves been engaged in unneutral or insurrectionary acts.

In view of the ill-founded character of many, if not most, of such claims and of the danger to the peace and safety of the states of Latin America resulting from their forcible collection by leading European

⁵⁰ Moore, ii, pp. 1133 ff., 1156 ff.

⁵¹ Moore, ii, pp. 1319 ff.

⁵² These figures are taken from Latané's excellent article on "The Forcible Collection of International Debts" in the *Atlantic Monthly* for October, 1906, p. 546.

⁵³ This is based on a statement in the *Outlook* (1906), vol. 82, p. 104.

powers, the United States would be fully justified even in advancing a step beyond the Drago Doctrine and declaring formally to the world that it could not see with indifference any attempt at the forcible collection of private claims of a pecuniary nature on the Western Continent.⁵⁴ The Monroe Doctrine, at least in its present form, forbids the further acquisition, colonization, or permanent occupation of American territory by any European power, and it is believed that such a declaration would not only be in harmony with the spirit of that doctrine but that it would lend strength to the principle of non-intervention.

In view, however, of the fact that some of these claims may be well-founded and that the judicial tribunals in certain portions of Central America are notoriously inadequate for the impartial and effective administration of justice, and because of the frequency of revolutions due mainly to fraudulent elections, it might be well to couple this declaration with another, insisting that all such claims be submitted to fair and impartial arbitral tribunals or mixed commissions composed of representatives from both the creditor and debtor nations.⁵⁵

The United States has no desire to become a "debt collecting agency" for European creditors or to establish a protectorate over the states of Latin America. For these reasons our government should avoid, if possible, the responsibility of an *ex parte* decision regarding the validity of these claims, although the assumption of such a burden would be preferable to their forcible collection by European powers. Our insistence upon arbitration in the case of the famous boundary dispute between Great Britain and Venezuela in 1895, points the way toward what is at once the easiest and most equitable settlement of such disputes.

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⁵⁴The wisdom of such a course is greatly strengthened by the decision of the Hague tribunal rendered on February 22, 1904, which granted the contention of the allies that they were entitled to preferential treatment in consequence of their coercion of Venezuela. For a recent thoroughgoing criticism of this decision, see a long article by M. Mallarmé in the *Revue Générale D. I. P.* for 1906, pp. 423-500.

⁵⁵Professor F. de Martens suggests the Hague tribunal as a suitable court for the arbitration of these claims, but in view of its decision in the Venezuela case, it would perhaps be better to retain the present system of mixed commissions.